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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

) Case No.

FRANK GUTIERREZ, individually and)
on behalf of all others similarly situated,) **CLASS ACTION**

Plaintiff,) **COMPLAINT FOR VIOLATIONS**
vs.) **OF:**

A1 DIABETES & MEDICAL) 1. NEGLIGENT VIOLATIONS
SUPPLY, INC., and DOES 1 through) OF THE TELEPHONE
10, inclusive, and each of them,) CONSUMER PROTECTION
ACT [47 U.S.C. §227(b)]
Defendant.) 2. WILLFUL VIOLATIONS
ACT [47 U.S.C. §227(b)]
CONSUMER PROTECTION
ACT [47 U.S.C. §227(b)]
ACT [47 U.S.C. §227(c)]
WILLFUL VIOLATIONS
ACT [47 U.S.C. §227(c)]
CONSUMER PROTECTION
ACT [47 U.S.C. §227(c)]

) **DEMAND FOR JURY TRIAL**

1 Plaintiff FRANK GUTIERREZ (“Plaintiff”), individually and on behalf of
2 all others similarly situated, alleges the following upon information and belief
3 based upon personal knowledge:

4 **NATURE OF THE CASE**

5 1. Plaintiff brings this action individually and on behalf of all others
6 similarly situated seeking damages and any other available legal or equitable
7 remedies resulting from the illegal actions of A1 DIABETES & MEDICAL
8 SUPPLY, INC. (“Defendant”), in negligently, knowingly, and/or willfully
9 contacting Plaintiff on Plaintiff’s cellular telephone in violation of the Telephone
10 Consumer Protection Act, *47. U.S.C. § 227 et seq.* (“TCPA”) and related
11 regulations, specifically the National Do-Not-Call provisions, thereby invading
12 Plaintiff’s privacy.

13 **JURISDICTION & VENUE**

14 2. Jurisdiction is proper under *28 U.S.C. § 1332(d)(2)* because Plaintiff,
15 a resident of California, seeks relief on behalf of a Class, which will result in at
16 least one class member belonging to a different state than that of Defendant, a
17 Tennessee company. Plaintiff also seeks up to \$1,500.00 in damages for each call
18 in violation of the TCPA, which, when aggregated among a proposed class in the
19 thousands, exceeds the \$5,000,000.00 threshold for federal court jurisdiction.
20 Therefore, both diversity jurisdiction and the damages threshold under the Class
21 Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

22 3. Venue is proper in the United States District Court for the Central
23 District of California pursuant to *28 U.S.C. § 1391(b)* and because Defendant does
24 business within the State of California and Plaintiff resides within the County of
25 Orange.

26 **PARTIES**

27 4. Plaintiff, FRANK GUTIERREZ (“Plaintiff”), is a natural person
28 residing in Santa Ana, California and is a “person” as defined by *47 U.S.C. § 153*

(39).

5. Defendant, A1 DIABETES & MEDICAL SUPPLY, INC. (“Defendant”) is an online marketing company, and is a “person” as defined by 47 U.S.C. § 153 (39).

6. The above named Defendant, and its subsidiaries and agents, are collectively referred to as "Defendants." The true names and capacities of the Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

7. Plaintiff is informed and believes that at all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and scope of said agency and/or employment with the full knowledge and consent of each of the other Defendants. Plaintiff is informed and believes that each of the acts and/or omissions complained of herein was made known to, and ratified by, each of the other Defendants.

FACTUAL ALLEGATIONS

8. Beginning in or around July of 2015, Defendant contacted Plaintiff on Plaintiff's cellular telephone number ending in -7786, in an attempt to solicit Plaintiff to purchase Defendant's services.

9. Defendant used an “automatic telephone dialing system” as defined by *47 U.S.C. § 227(a)(1)* to place its call to Plaintiff seeking to solicit its services.

10. Defendant contacted or attempted to contact Plaintiff from telephone numbers (662) 298-4242 and (321) 473-6956 confirmed to be Defendant's number.

11. Defendant's calls constituted calls that were not for emergency purposes as defined by *47 U.S.C. § 227(b)(1)(A)*.

12. Defendant's calls were placed to telephone number assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to *47 U.S.C. § 227(b)(1)*.

13. During all relevant times, Defendant did not possess Plaintiff's "prior express consent" to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice on his cellular telephone pursuant to *47 U.S.C. § 227(b)(1)(A)*.

14. Further, Plaintiff's cellular telephone number ending in -7786 was added to the National Do-Not-Call Registry on or about December 2, 2003.

15. Defendant placed multiple calls soliciting its business to Plaintiff on his cellular telephone ending in -7786 in or around January 11, 2005.

16. Such calls constitute solicitation calls pursuant to 47 C.F.R. § 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

17. Plaintiff received numerous solicitation calls from Defendant within a 12-month period.

18. Defendant continued to call Plaintiff in an attempt to solicit its services and in violation of the National Do-Not-Call provisions of the TCPA.

19. Upon information and belief, and based on Plaintiff's experiences of being called by Defendant after being on the National Do-Not-Call list for several years prior to Defendant's initial call, and at all relevant times, Defendant failed to establish and implement reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under 47 U.S.C. § 227(c)(5).

CLASS ALLEGATIONS

20. Plaintiff brings this action individually and on behalf of all others similarly situated, as a member the two proposed classes (hereafter, jointly, "The Classes").

21. The class concerning the ATDS claim for no prior express consent

1 (hereafter “The ATDS Class”) is defined as follows:

2 All persons within the United States who received any
3 solicitation/telemarketing telephone calls from
4 Defendant to said person’s cellular telephone made
5 through the use of any automatic telephone dialing
6 system or an artificial or prerecorded voice and such
7 person had not previously consented to receiving such
8 calls within the four years prior to the filing of this
Complaint

9 22. The class concerning the National Do-Not-Call violation (hereafter
10 “The DNC Class”) is defined as follows:

11 All persons within the United States registered on the
12 National Do-Not-Call Registry for at least 30 days, who
13 had not granted Defendant prior express consent nor had
14 a prior established business relationship, who received
15 more than one call made by or on behalf of Defendant
16 that promoted Defendant’s products or services, within
17 any twelve-month period, within four years prior to the
filing of the complaint.

18 23. Plaintiff represents, and is a member of, The ATDS Class, consisting
19 of all persons within the United States who received any collection telephone calls
20 from Defendant to said person’s cellular telephone made through the use of any
21 automatic telephone dialing system or an artificial or prerecorded voice and such
22 person had not previously not provided their cellular telephone number to
23 Defendant within the four years prior to the filing of this Complaint.

24 24. Plaintiff represents, and is a member of, The DNC Class, consisting
25 of all persons within the United States registered on the National Do-Not-Call
26 Registry for at least 30 days, who had not granted Defendant prior express consent
27 nor had a prior established business relationship, who received more than one call
28 made by or on behalf of Defendant that promoted Defendant’s products or services,

1 within any twelve-month period, within four years prior to the filing of the
2 complaint.

3 25. Defendant, its employees and agents are excluded from The Classes.
4 Plaintiff does not know the number of members in The Classes, but believes the
5 Classes members number in the thousands, if not more. Thus, this matter should
6 be certified as a Class Action to assist in the expeditious litigation of the matter.

7 26. The Classes are so numerous that the individual joinder of all of its
8 members is impractical. While the exact number and identities of The Classes
9 members are unknown to Plaintiff at this time and can only be ascertained through
10 appropriate discovery, Plaintiff is informed and believes and thereon alleges that
11 The Classes includes thousands of members. Plaintiff alleges that The Classes
12 members may be ascertained by the records maintained by Defendant.

13 27. Plaintiff and members of The ATDS Class were harmed by the acts of
14 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
15 and ATDS Class members via their cellular telephones thereby causing Plaintiff
16 and ATDS Class members to incur certain charges or reduced telephone time for
17 which Plaintiff and ATDS Class members had previously paid by having to retrieve
18 or administer messages left by Defendant during those illegal calls, and invading
19 the privacy of said Plaintiff and ATDS Class members.

20 28. Common questions of fact and law exist as to all members of The
21 ATDS Class which predominate over any questions affecting only individual
22 members of The ATDS Class. These common legal and factual questions, which
23 do not vary between ATDS Class members, and which may be determined without
24 reference to the individual circumstances of any ATDS Class members, include,
25 but are not limited to, the following:

26 a. Whether, within the four years prior to the filing of this
27 Complaint, Defendant made any telemarketing/solicitation call
28 (other than a call made for emergency purposes or made with

1 the prior express consent of the called party) to a ATDS Class
2 member using any automatic telephone dialing system or any
3 artificial or prerecorded voice to any telephone number
4 assigned to a cellular telephone service;

5 b. Whether Plaintiff and the ATDS Class members were damaged
6 thereby, and the extent of damages for such violation; and
7 c. Whether Defendant should be enjoined from engaging in such
8 conduct in the future.

9 29. As a person that received numerous telemarketing/solicitation calls
10 from Defendant using an automatic telephone dialing system or an artificial or
11 prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting
12 claims that are typical of The ATDS Class.

13 30. Plaintiff and members of The DNC Class were harmed by the acts of
14 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
15 and DNC Class members via their telephones for solicitation purposes, thereby
16 invading the privacy of said Plaintiff and the DNC Class members whose telephone
17 numbers were on the National Do-Not-Call Registry. Plaintiff and the DNC Class
18 members were damaged thereby.

19 31. Common questions of fact and law exist as to all members of The
20 DNC Class which predominate over any questions affecting only individual
21 members of The DNC Class. These common legal and factual questions, which do
22 not vary between DNC Class members, and which may be determined without
23 reference to the individual circumstances of any DNC Class members, include, but
24 are not limited to, the following:

25 a. Whether, within the four years prior to the filing of this
26 Complaint, Defendant or its agents placed more than one
27 solicitation call to the members of the DNC Class whose
28 telephone numbers were on the National Do-Not-Call Registry

1 and who had not granted prior express consent to Defendant and
2 did not have an established business relationship with
3 Defendant;

4 b. Whether Defendant obtained prior express written consent to
5 place solicitation calls to Plaintiff or the DNC Class members'
6 telephones;

7 c. Whether Plaintiff and the DNC Class member were damaged
8 thereby, and the extent of damages for such violation; and
9 d. Whether Defendant and its agents should be enjoined from
10 engaging in such conduct in the future.

11 32. As a person that received numerous solicitation calls from Defendant
12 within a 12-month period, who had not granted Defendant prior express consent
13 and did not have an established business relationship with Defendant, Plaintiff is
14 asserting claims that are typical of the DNC Class.

15 33. Plaintiff will fairly and adequately protect the interests of the members
16 of The Classes. Plaintiff has retained attorneys experienced in the prosecution of
17 class actions.

18 34. A class action is superior to other available methods of fair and
19 efficient adjudication of this controversy, since individual litigation of the claims
20 of all Classes members is impracticable. Even if every Classes member could
21 afford individual litigation, the court system could not. It would be unduly
22 burdensome to the courts in which individual litigation of numerous issues would
23 proceed. Individualized litigation would also present the potential for varying,
24 inconsistent, or contradictory judgments and would magnify the delay and expense
25 to all parties and to the court system resulting from multiple trials of the same
26 complex factual issues. By contrast, the conduct of this action as a class action
27 presents fewer management difficulties, conserves the resources of the parties and
28 of the court system, and protects the rights of each Classes member.

35. The prosecution of separate actions by individual Classes members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of the other Classes members not parties to such adjudications or that would substantially impair or impede the ability of such non-party Class members to protect their interests.

36. Defendant has acted or refused to act in respects generally applicable to The Classes, thereby making appropriate final and injunctive relief with regard to the members of the Classes as a whole.

FIRST CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b).

On Behalf of the ATDS Class

37. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-36.

38. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular *47 U.S.C. § 227(b)(1)(A)*.

39. As a result of Defendant's negligent violations of *47 U.S.C. § 227(b)*, Plaintiff and the Class Members are entitled an award of \$500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

40. Plaintiff and the ATDS Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

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SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

On Behalf of the ATDS Class

41. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-36.

42. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular *47 U.S.C. § 227 (b)(1)(A)*.

43. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and the ATDS Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

44. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

On Behalf of the DNC Class

45. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-36.

46. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*, and in particular *47 U.S.C. § 227(c)(5)*.

47. As a result of Defendant's negligent violations of 47 U.S.C. § 227(c),

1 Plaintiff and the DNC Class Members are entitled an award of \$500.00 in statutory
2 damages, for each and every violation, pursuant to *47 U.S.C. § 227(c)(5)(B)*.

3 Plaintiff and the DNC Class members are also entitled to and seek
4 injunctive relief prohibiting such conduct in the future.

5 **FOURTH CAUSE OF ACTION**

6 **Knowing and/or Willful Violations of the Telephone Consumer Protection**

7 **Act**

8 **47 U.S.C. §227 et seq.**

9 **On Behalf of the DNC Class**

10 Plaintiff repeats and incorporates by reference into this cause of action
11 the allegations set forth above at Paragraphs 1-36.

12 The foregoing acts and omissions of Defendant constitute numerous
13 and multiple knowing and/or willful violations of the TCPA, including but not
14 limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*,
15 in particular *47 U.S.C. § 227 (c)(5)*.

16 As a result of Defendant's knowing and/or willful violations of *47*
17 *U.S.C. § 227(c)*, Plaintiff and the DNC Class members are entitled an award of
18 \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C.*
19 *§ 227(c)(5)*.

20 Plaintiff and the DNC Class members are also entitled to and seek
21 injunctive relief prohibiting such conduct in the future.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff requests judgment against Defendant for the following:

24 **FIRST CAUSE OF ACTION**

25 **Negligent Violations of the Telephone Consumer Protection Act**

26 **47 U.S.C. §227(b)**

27 • As a result of Defendant's negligent violations of *47 U.S.C.*
28 *§227(b)(1)*, Plaintiff and the ATDS Class members are entitled to and

1 request \$500 in statutory damages, for each and every violation,
2 pursuant to *47 U.S.C. 227(b)(3)(B)*.

3 • Any and all other relief that the Court deems just and proper.

4 **SECOND CAUSE OF ACTION**

5 **Knowing and/or Willful Violations of the Telephone Consumer Protection**

6 **Act**

7 **47 U.S.C. §227(b)**

8 • As a result of Defendant's willful and/or knowing violations of *47*
9 *U.S.C. §227(b)(1)*, Plaintiff and the ATDS Class members are
10 entitled to and request treble damages, as provided by statute, up to
11 \$1,500, for each and every violation, pursuant to *47 U.S.C.*
12 *§227(b)(3)(B)* and *47 U.S.C. §227(b)(3)(C)*.

13 • Any and all other relief that the Court deems just and proper.

14 **THIRD CAUSE OF ACTION**

15 **Negligent Violations of the Telephone Consumer Protection Act**

16 **47 U.S.C. §227(c)**

17 • As a result of Defendant's negligent violations of *47 U.S.C.*
18 *§227(c)(5)*, Plaintiff and the DNC Class members are entitled to and
19 request \$500 in statutory damages, for each and every violation,
20 pursuant to *47 U.S.C. 227(c)(5)*.

21 • Any and all other relief that the Court deems just and proper.

22 **FOURTH CAUSE OF ACTION**

23 **Knowing and/or Willful Violations of the Telephone Consumer Protection**

24 **Act**

25 **47 U.S.C. §227(c)**

26 • As a result of Defendant's willful and/or knowing violations of *47*
27 *U.S.C. §227(c)(5)*, Plaintiff and the DNC Class members are entitled
28 to and request treble damages, as provided by statute, up to \$1,500,

1 for each and every violation, pursuant to *47 U.S.C. §227(c)(5)*.
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- 3 • Any and all other relief that the Court deems just and proper.
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5 53. Pursuant to the Seventh Amendment to the Constitution of the United
6 States of America, Plaintiff is entitled to, and demands, a trial by jury.
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8 Respectfully Submitted this 10th Day of February, 2017.
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10 LAW OFFICES OF TODD M. FRIEDMAN, P.C.
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12 By: /s/ Todd M. Friedman
13 Todd M. Friedman
14 Law Offices of Todd M. Friedman
15 Attorney for Plaintiff
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